

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-033234-085

S U P E R I O R C O U R T
(Commercial Division)
(Sitting as a court designated pursuant to the
Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36)

**IN THE MATTER OF THE PLAN OF
COMPROMISE OR ARRANGEMENT OF:**

SHERMAG INC.

and

JAYMAR FURNITURE CORP.

Debtors/PETITIONERS

and

SCIERIE MONTAUBAN INC.

and

MÉGABOIS (1989) INC.

and

SHERMAG CORPORATION

and

JAYMAR SALES CORPORATION

Debtors

and

GLOBAL PAYMENTS CANADA INC., a legal person duly constituted under the laws of Canada, having its principal place of business at 3381 Steeles Avenue East, Suite 200, Toronto, Ontario, M2H 3S7

and

GLOBAL PAYMENTS DIRECT, INC., a legal person with a place of business at 10 Glenlake Parkway, North Tower, Atlanta, Georgia, 30328 USA

Respondents

and

GEOSAM INVESTMENTS LTD.

Lender

and

RSM RICHTER INC.

Monitor

MOTION TO FORCE A PERSON TO RESPECT THE INITIAL ORDER
(Sections 9,10 and 11 of the *Companies' Creditors Arrangement Act*, R.S.C. (1985),
c. C-36 (hereinafter "**CCAA**")

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, PETITIONERS RESPECTFULLY SUBMIT THE FOLLOWING:

I. INTRODUCTION

1. Petitioner Shermag Inc. ("**Shermag**") is incorporated under Part IA of the *Companies Act* (Québec) and have their domicile at 2171 King Street West, in the City of Sherbrooke, Province of Québec, the whole as appears from excerpts of the corporate registry (CIDREQ) communicated herewith as **Exhibit R-1**.
2. Petitioner Jaymar Furniture Corp. ("**Jaymar**") was incorporated under the laws of Nova Scotia and has been continued under the *Canada Business Corporations Act* (the "**CBCA**") and has its domicile at 75 Jaymar Street, in the City of Terrebonne, Province of Québec, the whole as appears from an excerpt of the corporate registry (CIDREQ) communicated herewith as **Exhibit R-2**.
3. Respondent Global Payments Canada Inc., together with its parent corporation, Global Payments Direct, Inc. (referred to collectively as "**Global**") provide electronic transaction processing services and business-to-business payment card and processing services, such as money transfer, cash management, financial electronic data interchange, management information and reporting services. In particular, Global provides credit card payment processing services to Shermag pursuant to a certain *Convention de Marchand* dated May 15, 2008, (the "**Agreement**"), a copy of which is communicated herewith as **Exhibit R-3**.
4. It has to be noted that the Agreement was entered into after the issuance of the Initial Order.
5. A *Convention de Marchand* with Jaymar has also been agreed upon a few years ago. Petitioners cannot locate a copy of said agreement (together with the Agreement, the "**Agreements**").

6. On May 5, 2008, The Honourable Robert Mongeon, J.S.C. issued an Initial Order (the “**Initial Order**”) pursuant to the *Companies’ Creditors Arrangement Act* (the “*CCAA*”) in relation to Petitioners, a copy of which is communicated herewith as **Exhibit R-4**. The Initial Order provided for a stay of proceedings until June 24, which was subsequently extended to December 10, 2008 (the “**Stay Period**”).
7. As described hereinabove, Shermag entered into the Agreement with Global for the processing of credit card payments from customers on or about May 15, 2008, roughly 10 days subsequent to the issuance of the Initial Order.

II. GLOBAL’S ILLEGAL RETENTION OF PAYMENTS

8. As part of its restructuring, Shermag is in the process of selling its inventory of finished goods in order, *inter alia*, to acquire the necessary funds to give effect to its Plan of Arrangement under the *CCAA*, and to generate income to pay suppliers, employees and various creditors. It is Petitioners’ intent to continue to carry on their operations, in a restructured manner, which will allow for the preservation of jobs and maximize the returns to Petitioners’ creditors.
9. Global was processing customer payments made by credit and debit card by retail customers who purchase Shermag and Jaymar’s finished goods inventory.
10. By letters dated August 28, 2008 addressed to Shermag and Jaymar, Global wrote to Shermag and Jaymar and purported to terminate the Agreements effective September 29, 2008. Global also announced that it would begin withholding all credit card payments made by Shermag and Jaymar customers rather than forwarding the amounts to Shermag or Jaymar in order to create a reserve to cover any fees or chargebacks that might arise following the date of their purported termination of the Agreement. The relevant portions of this letter, communicated herewith as **Exhibit R-5**, read as follows:

Global has elected to withhold 100% of your transactions being processed through your account for the duration of your processing through Global in order to establish a reserve. A reserve will be required for at least 180 days after your last deposit to cover fees, chargebacks, etc. processed to Shermag Inc’s Global merchant accounts after 9/29/08.

[our emphasis]

11. Attorneys for Petitioners wrote back to Global by letter dated September 10, 2008 noting that Global's purported termination of the Agreements was illegal and in breach of the Initial Order and further that Global's purported appropriation of the entirety of the payments processed by Global on Shermag and Jaymar's behalf was also illegal, and that these monies were to be remitted to Shermag and Jaymar immediately. A copy of this letter is communicated herewith as **Exhibit R-6**.
12. By letter dated September 17, 2008, Global wrote to Petitioners' attorneys and indicated that they were suspending the purported termination of the Agreements, and alleging that Global's purported creation, at its sole discretion, of a reserve equal to 100% of the transaction amounts being processed by Global on behalf of Shermag and Jaymar was permitted under the Agreement and was appropriate in the circumstances. A copy of this letter is communicated herewith as **Exhibit R-7**.
13. On October 3, 2008, attorneys for Petitioners responded to Global's letter of September 17, 2008 by noting Global's suspension of its purported termination of the Agreements, and reiterating Petitioners' demand that the proceeds of transactions processed by Global on Shermag and Jaymar's behalf be remitted immediately. In this letter, Petitioners' attorneys also emphasize that:
 - (a) the Initial Order provides that no person providing services to Shermag and related entities covered by the Initial Order may modify the terms and conditions under which those services are provided, and that no such service provider may withhold any funds belonging to Shermag;
 - (b) despite requests to do so, Global has not provided any written explanation as to how or when the funds withheld would be remitted to Shermag or Jaymar;
 - (c) the amounts of chargebacks or returns on payments processed by Global (due mainly to returns of product purchased by customers pursuant to Shermag's standard returns policy) had been very marginal to date (approximately 1% of monthly sales), and that a withholding by Global of 100% of these proceeds was therefore grossly disproportionate to the risks involved, if any;

- (d) that even with respect to the very marginal chargebacks that had occurred, Global was not in fact debiting these amounts from the funds it purported to withhold, but was instead illegally debiting these amounts from credits owed to customers.

Finally, Petitioners' attorneys demanded that the funds purportedly withheld by Global be remitted to Shermag or Jaymar by the end of business on October 7, 2008, failing which Petitioners would be obliged to take recourse before the Courts. A copy of this letter is communicated as **Exhibit R-8**.

- 14. On October 9, 2008, attorneys for Petitioners sent a letter to Global's attorneys confirming the following:
 - (a) Shermag and Jaymar were no longer using the services of Global pursuant to the Agreements;
 - (b) all of the customers of Shermag or Jaymar who purchased goods using the services provided by Global have already received delivery of said goods and are in possession of same;
 - (c) Global was to remit to Shermag and Jaymar 50% of the funds it was withholding (i.e. \$224,185.38) by October 10, 2008; and
 - (d) Shermag and Jaymar were reserving all of their rights and recourses against Global.

the whole as more fully appears from a copy of said letter communicated herewith as **Exhibit R-9**.

- 15. On or around October 14, 2008, Global finally remitted to Shermag the amount of \$224,185.38 it had promised to remit on October 10, 2008.
- 16. As of the date of this Motion, Global is still inappropriately withholding a total amount of \$224,185.38 in respect of customer debit and credit card payments processed by it on behalf of Shermag and Jaymar. Shermag and Jaymar are entitled to be paid this money immediately.

17. As a result of being deprived of the proceeds of sale of its finished inventory as a result of Global's actions, Petitioners have been forced to borrow an equivalent sum of money to pay suppliers, employees and creditors through a line of credit on which it is obliged to pay 12% interest, as appears from a document communicated herewith as **Exhibit R-10**. Had Global not illegally withheld these monies, Petitioners' line of credit would have been reduced by an equivalent amount. Shermag is therefore entitled to claim 12% interest on the amounts retained by Global from the date of the first letter of demand dated September 10, 2008, Exhibit R-6.

III. THE AGREEMENT AND THE INITIAL ORDER

18. Global purports to rely on specific provisions in the Agreement dealing with risk management and indemnification as the source of its alleged right to withhold the entirety of the amount of the customer credit card transactions it processes on behalf of Shermag and Jaymar. These provisions of the Agreement read as follows:

La gestion des risques

1. Comme condition à votre acceptation en tant que client en vertu des présentes, Global et le Membre peuvent, à leur gré, vous demander de verser un dépôt de garantie avant de commencer la prestation des services afin de garantir l'exécution de vos obligations en vertu de l'une de ces Conventions ou des deux.
2. En tout temps, comme condition à l'acceptation par Global du risque financier associé au traitement d'opérations pour vous, Global et le Membre peuvent, à leur gré, demander la constitution d'un compte de réserve pour garantir l'exécution de vos obligations en vertu de l'une de ces Conventions ou des deux. Le compte de réserve peut être financé au moyen de l'une ou de la totalité des méthodes suivantes :
 - un paiement direct effectué par vous (si Global ou le Membre vous le demande);
 - le dépôt du produit de débiteurs que vous présentez à des fins d'achat; ou
 - le transfert par Global ou le Membre au compte de réserve de fonds retirés i) de votre compte bancaire de marchand, ii) d'autres comptes tenus par vous auprès du Membre (avec le

consentement du Membre) ou iii) d'autres comptes tenus par vous auprès de vos institutions financières désignées.

3. Les fonds dans un compte de réserve ou un dépôt de garantie ne portent pas intérêt et peuvent être détenus jusqu'à l'exécution de la totalité de vos obligations en vertu de ces Conventions et l'expiration de tout droit à des débits compensatoires ou de toutes périodes d'indemnisation potentiellement applicables à l'égard de débiteurs achetés en vertu des règles et règlements des associations de cartes de crédit ou d'organisations de réseau, la période de détention pouvant s'étendre au-delà de l'expiration ou de la résiliation de ces Conventions. Global ou le Membre peut déduire de ce compte de réserve ou de ce dépôt de garantie tout montant qui lui est dû relativement au traitement d'opérations par carte de crédit et/ou carte de débit pour votre compte.

[...]

L'indemnisation

1. Vous vous engagez à indemniser et à tenir à couvert Global et le Membre à l'égard des responsabilités, pertes, dommages, contestations, compensations, réclamations ou demandes reconventionnelles de quelque nature que ce soit découlant des services de traitement des paiements aux termes des présentes ou s'y rapportant, y compris les réclamations et plaintes faites par un titulaire de carte ou toute entité relativement à une opération par carte réalisée en vertu des Conventions ou tout autre service fourni aux termes des présentes.
19. Although the Agreement does provide for Global's right to establish a reserve, it does not provide for the amount of such reserve. It was not until August 2008 that Global first began insisting on the necessity of holding a reserve equal to 100% of all payments processed by it on Shermag and Jaymar's behalf. Global has not provided any justification for such a large reserve and Petitioners are unaware of any fact or reason that would justify such a reserve, particularly in light of the fact that the rate of chargebacks or returns by customers experienced thus far as showing on Global's own statements has been on the order of roughly 1% (of monthly sales), the whole as appears from a summary and copies of monthly statements received from Global in respect of sales by Jaymar and Shermag for the months of May – September, 2008, communicated herewith as **Exhibit R-11**.

20. Significantly, all sales made by Shermag in liquidation of its finished inventory are on a “final” basis, meaning that it is not required to accept any customer returns. All customers are informed of the fact that the sales are final at the point of sale, and receive written notice of this, as appears from a copy of the standard-form document provided to customers, communicated herewith as **Exhibit R-12**. The very few returns that have been accepted and which make up the 1% rate (of monthly sales) experienced to date have been in respect of special circumstances, or exchanges of one piece of furniture for another. In principle however, all sales are final.
21. In any event, and notwithstanding the terms of the Agreements, Global is not entitled to withhold any amount of the proceeds of the transactions that it processes on Shermag or Jaymar’s behalf as a result of the terms of the Initial Order rendered by this Court on May 5, 2008, which at paragraph 9, page 5 thereof, forbids any Person from applying amounts placed on deposit by Petitioners during the Stay Period “[...] in reduction of or repayment of amounts owing to such Person as of the date of the Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof [...]”. Through the application of terms of the Agreement, Global purports to be entitled to oblige Shermag and Jaymar to place funds on deposit with it an amount equal to 100% of the proceeds of the transactions that it processes which it may then draw upon to repay itself the amount of any chargebacks, customer returns, or refunds, the whole in breach of the terms of paragraph 9 of the Initial Order, which reads in its entirety as follows:
9. ORDER that, without limiting the generality of the foregoing and subject to the rights of the Lender and Section 18.1 of the *CCAA*, if applicable, cash or cash equivalents placed on deposit by Petitioners with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of the Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by Petitioners and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments

deposited into Petitioners' account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

22. The Initial Order further provides, at paragraph 8, page 4 thereof, that during the Stay Period, no Person shall terminate agreements or contracts with Shermag, modify the terms of any such agreements or contracts, or interfere with the supply of goods and services. Importantly, subparagraph 8(d) of the Initial Order also further specifies that suppliers shall be entitled to be paid for goods and services that they provide, but explicitly stipulates that Petitioners shall not be required to pay or grant any "deposits whether by way of cash, letter of credit or guarantee, stand-by fees or similar items". The complete text of paragraph 8 of the Initial Order reads as follows:

8. ORDER that, without limiting the generality of the foregoing, during the Stay Period, all Persons having agreements, contracts or arrangements with Petitioners or in connection with any of the Property, whether written or oral, for any subject or purpose:

(a) are restrained from accelerating, terminating, cancelling, suspending, refusing to modify or extend on reasonable terms such agreements, contracts or arrangements or the rights of Petitioners or any other Person thereunder;

(b) are restrained from modifying, suspending or otherwise interfering with the supply of any goods, services, or other benefits by or to such Person thereunder (including, without limitation, any directors' and officers' insurance, any telephone numbers, any form of telecommunications service, any oil, gas, electricity or other utility supply);

(c) are restrained from interfering or retaining in any manner the delivery of any goods by or to the Petitioners, so long as Petitioners pay the prices or charges for the services rendered by such Persons for the services received after the date of the Order as such prices or charges become due in accordance with the law or as may be hereafter negotiated;

(d) shall continue to perform and observe the terms and conditions contained in such agreements, contracts or arrangements, so long as Petitioners pay the prices or charges for such goods and services received after the date of the Order as such prices or charges become due in accordance with the law or as may be hereafter negotiated (other than deposits whether by way

of cash, letter of credit or guarantee, stand-by fees or similar items which Petitioners shall not be required to pay or grant), unless the prior written consent of Petitioners and the Monitor is obtained or the leave of this Court is granted; and

[...]

23. It is abundantly clear from the foregoing that by forcibly obtaining a deposit or reserve from Shermag and Jaymar, Global is in breach of the terms of the Initial Order, and any such deposit or reserve is illegal and must be refunded to Shermag and Jaymar immediately, for the benefit and use the company and all of its creditors.
24. It is inconceivable that in the context of *CCAA* proceedings that one party (in this case, Global) should be entitled to arrogate to itself on its own whim and volition, 100% of the credit card receivables of the Petitioners, to the detriment of its creditors and to thereby threaten the success of the restructuring, all on the thin pretext of requiring a reserve to cover a chargeback rate of roughly 1% (of monthly sales) on payments processed by it.
25. Furthermore, Shermag and Jaymar have now ceased selling finished inventory to consumers directly, and therefore Global will not be processing any further debit and credit card payments on its behalf, and the rate of chargebacks or returns in relation to previous sales will not increase in the future.
26. Global illegally retains an amount of \$224,189.38;
27. Global has stated that it needs a reserve for a period of six (6) months after the sale. Therefore, if Petitioners were to accept such approach (which approach is denied), it would allow Global to retain 1% of the sales of the last six months amounting to \$12 030.67;
28. Petitioners have an immediate need for financing to meet their obligations and to maintain the stability of the operations while restructuring its business, and the withholding of funds by Global is to the detriment of Petitioners and all of its creditors, and is abusive, exorbitant and unreasonable.

29. For the reasons explained above, Petitioners believe it is both appropriate and necessary that the relief being sought be granted.
30. Petitioners respectfully submit that this Motion should be granted in accordance with its conclusions.
31. The present Motion is well founded in fact and law.

WHEREFORE MAY IT PLEASE THIS HONOURABLE COURT TO:

INTERIM ORDER:

ORDER Global Payments Canada Inc., Global Payments Direct, Inc. and/or all related entities to remit to Shermag, within 24 hours of the judgment to intervene herein, an amount of \$212,154.71.

DECLARE sufficient the service of the present Petition and prior notice of its presentation.

PERMIT the service of any order rendered herein by way of facsimile transmission and outside the ordinary hours of service.

ORDER the provisional execution of this judgment notwithstanding any appeal and without the necessity of furnishing any security.

PERMANENT ORDER:

GRANT the Petition.

DECLARE sufficient the service of the present Petition and prior notice of its presentation.

ORDER Global Payments Canada Inc., Global Payments Direct, Inc. and/or all related entities to immediately remit to Shermag all amounts of money that it or they purport to withhold as a deposit or reserve in relation to payments processed

pursuant to the Agreements or pursuant to any other agreement or contract or any other basis whatsoever.

ENJOIN Global Payments Canada Inc., Global Payments Direct, Inc. and/or all related entities from withholding any further monies in relation to payments processed pursuant to the Agreements or pursuant to any other agreement or contract or any other basis whatsoever.

PERMIT the service of any order rendered herein by way of facsimile transmission and outside the ordinary hours of service.

ORDER the provisional execution of this judgment notwithstanding any appeal and without the necessity of furnishing any security.

THE WHOLE with costs, and with interest at 12% calculated from September 10, 2008.

MONTREAL, November 6, 2008



DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for Petitioners Shermag Inc. and Jaymar
Furniture Corp.

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-033234-085

S U P E R I O R C O U R T
(Commercial Division)
(Sitting as a court designated pursuant to the
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**IN THE MATTER OF THE PLAN OF
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MÉGABOIS (1989) INC.

and

SHERMAG CORPORATION

and

JAYMAR SALES CORPORATION

Petitioners

and

RSM RICHTER INC.

Monitor

ATTESTATION OF AUTHENTICITY

I, the undersigned, Christian Lachance, attorney, practising my profession with the law firm of Davies Ward Phillips & Vineberg LLP, having its principal place of business at 1501 McGill College Avenue, 26th Floor, in the City and District of Montréal, Province of Québec, solemnly affirm that:

1. On November 7, 2008, at 9:35 a.m., Davies Ward Phillips & Vineberg LLP received by fax an Affidavit signed by Josée Girard dated November 7, 2008, a copy of such Affidavit is attached to this Attestation of Authenticity.

2. All the facts alleged herein are true.

AND I HAVE SIGNED:



CHRISTIAN LACHANCE

SOLEMNLY AFFIRMED BEFORE ME, at
Montréal, on this 7th day of November, 2008.



Commissioner for Oaths for all
judicial districts of Québec

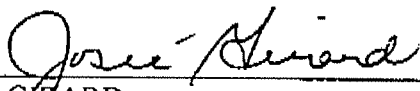


AFFIDAVIT

I, the undersigned, JOSÉE GIRARD, Vice-President Finance of Shermag Inc., having my place of business at 2171 King Street West, in the City of Sherbrooke, Province of Québec, solemnly declare as follows:

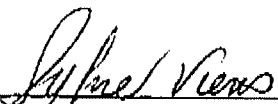
- 1. I am the duly authorized representative of the Petitioners;
- 2. All the facts contained in the present Petition are true;
- 3. All the facts contained in this Affidavit are true.

AND I HAVE SIGNED:



 JOSÉE GIRARD

Solemnly affirmed before me, in the City of Sherbrooke, Province of Québec, this 7 day of November, 2008



 Commission for Oaths

SYLVIE VIENS
 Commissaire à l'assermentation
 117, 272

NOTICE OF PRESENTATION

TO: Warren Fox
Credit Manager
GLOBAL PAYMENTS CANADA INC.
P.O. Box 4010 Etobicoke B
Etobicoke (Ontario) M9W 7H8

AND TO: **GLOBAL PAYMENTS DIRECT, INC.**
10 Glenlake Parkway, North Tower
Atlanta, Georgia, 30328 USA

TO : Me Stéphane Pitre
Borden Ladner Gervais
1000 de la Gauchetière Street Wuest
Suite 900
Montréal QC H3B 5H4
Attorneys for Global Payments Canada Inc. and Global Payments Direct, Inc.

TO: Me Martin Desrosiers
Osler, Hoskin & Harcourt LLP
1000 De La Gauchetière Street West, Suite 2100
Montréal (Québec) Canada H3B 4W5
Attorneys for Geosam Investment Limited

TO: Me Louis Gouin
Ogilvy Renault LLP
1981 McGill College Avenue, Suite 1100
Montréal (Québec) Canada H3A 3C1
Attorneys for the Monitor

TO: Mr. Phil Manel, CA
RSM Richter Inc.
2 Place Alexis Nihon, Suite 2200
Montréal, (Québec) Canada H3Z 3C2
Monitor

TO: Me Claude Gravel
Gowling Lafleur Henderson LLP
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Attorneys for Godbout, Plante associés enr.

TO : Me François Viau
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Attorneys for Industries Wajax

TO : Me Annie Claude Beauchemin
BCF LLP
1100 René-Lévesque Blvd. West, 25th Floor
Montréal (Québec) Canada H3B 5C9

Attorneys for Hachette Filipacchi Media U.S. Inc.

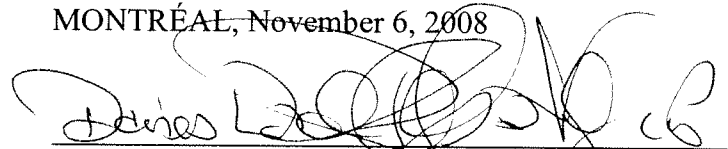
TO : Me Ian R. Rudnikoff, attorney
14 chemin Baronscourt
Hampstead QC H3X 1H1

Attorneys for Industrial Recovery Services, Inc. and M.G. Martin Auctioneers Inc.

TAKE NOTICE that the present Petition will be presented for adjudication before one of the judges of the Superior Court, sitting in the Commercial Division, in and for the judicial district of Montréal, on November 11, 2008, at 9:00 A.M., in room 16.12 of the Montréal Courthouse, located at 1 Notre-Dame Street East, in the City of Montréal, Province of Québec, or so soon thereafter as counsel may be heard.

DO GOVERN YOURSELVES ACCORDING.

MONTRÉAL, November 6, 2008



DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for Petitioners Shermag Inc. and Jaymar
Furniture Corp.

No. 500-11-033234-085

S U P E R I O R C O U R T
Commercial Division

SHERMAG INC. et als

Debtors/PETITIONERS

- and -

**GLOBAL PAYMENTS CANADA and GLOBAL
PAYMENTS DIRECT, INC.**

RESPONDENTS

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GEOSAM INVESTMENTS LTD.

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- and -

RSM RICHTER INC.

Monitor

Motion to Force a Person to Respect the Initial Order

(Sections 9,10 and 11 of the *Companies' Creditors*

Arrangement Act, R.S.C. (1985),

c. C-36 (hereinafter "*CCA*"), Affidavit, Attestation of

Authenticity, Notice of Presentation and List of

Exhibits in support of the Motion

ORIGINAL

Attorneys for Petitioners

Per: Me Denis Ferland and

Christian Lachance

Dir 514 841 6423

O/F 223966

DAVIES

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